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No. [illegible]

In the Supreme Court of the United States

October Term, 1953

UNITED STATES OF AMERICA, petitioner

v.

GUY W. DAVIS, [illegible]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 331

UNITED STATES OF AMERICA, PETITIONER

v.

GUY W. CAPPS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered in this case on April 15, 1953, by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Eastern District of Virginia denying defendant's motion to dismiss the complaint (R. 13–16) has been reported at 100 F. Supp. 30. The oral opinion of the District Court granting defendant's motion for a directed verdict at the end of the plaintiff's evidence (R. 147–149) has not been reported. The opinion of

the United States Court of Appeals (R. 164–170) has been reported at 204 F. 2d 655.

JURISDICTION

The judgment of the Court of Appeals was entered on April 15, 1953 (R. 170). On July 10, 1953, Mr. Justice Clark extended the time within which the petition for a writ of certiorari might be filed to and including September 12, 1953 (R. 173). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the President has general nonstatutory power to enter into an Executive Agreement with a foreign country in order to aid and implement a Congressional policy regulating commerce.

2. Whether Section 22 of the Agricultural Adjustment Act limited the Executive to that section's specific procedural and substantive remedies against damaging imports of subsidized commodities, and precluded the Executive from exercising his authority to enter into Executive Agreements to attain the same ends as the remedies provided in Section 22.

3. Whether, where the Federal Government as regulator of foreign trade is the beneficiary of a third-party beneficiary contract, judicial enforcement of the promise requires specific Congressional authorization.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the Constitution and of the statutes involved are set forth in Appendix A, *infra*, pp. 27–31.

STATEMENT

1. *The Potato Price Support Program and the Executive Agreement between the United States and Canada.* Under Section 1 (b) of the Agricultural Act of 1948 (*infra*, pp. 30–31), the United States undertook to support potatoes at 90 percent of the parity price. This program was carried out by means of contracts in which the United States, acting through the Commodity Credit Corporation, agreed to purchase from eligible growers and dealers all potatoes that could not be sold commercially at 90 percent of the parity price (R. 164 and 6 C. F. R. (1949 ed.) 648.51–65).[1]

The 1948 potato crop was one of the largest recorded in the United States as well as in the Maritime Provinces of Canada (R. 73). Since the Canadian unsupported price levels were considerably lower than those in the United States,[2] it became profitable to import Canadian potatoes

[1] The parity prices varied from State to State and increased from July 1948 to March–April 1949. The lowest parity price was $2.15 for July 1948 in North Dakota and Minnesota, the highest $3.50 for March–April for the mid-Atlantic States. 6 C. F. R. 648.64. See also R. 87–88.

[2] In the instant case, the price per cwt. was $1.82 at Charlottetown, P. E. I., in December 1948 (R. 150–151). Ninety

into the United States in spite of custom and freight charges.[3] On the other hand, the influx of Canadian potatoes was bound to decrease the quantity of domestic potatoes which could be sold in the open market at 90 percent of parity, thus materially increasing the cost of the price support program to the Government.

Congress anticipated that imports might interfere substantially with the price support program. Section 22 of the Agricultural Adjustment Act, as amended by Section 3 of the Agricultural Act of 1948 (*infra*, pp. 27–30), contains a method for dealing with the problem. It provides for a direction by the President to the Tariff Commission to investigate the situation, an investigation by the Tariff Commission after due notice and opportunity for hearing to interested parties, a report by the Tariff Commission containing findings and recommendations, findings of fact by the President on the basis of the report, and finally imposition on the objectionable imports of fees not to exceed 50 per centum *ad valorem* or of quantitative limitations.

Two considerations were believed to make it inadvisable to apply Section 22 to the potato situation. While suited to work out a long-range agri-

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percent of parity for Maine potatoes at the same time was $2.70 (6 C. F. R. 648.64).

[3] Custom dues amounted to $0.75 per cwt. (R. 76), freight from Prince Edward Island to Florida $0.40 per cwt. (R. 77, 158).

cultural program, Section 22 was too complicated and slow to cope with the temporary problems caused by the sudden bumper crop of a perishable commodity. In 1948 the customary time for the Tariff Commission to act was 9–10 months. 94 Cong. Rec. 8450.[4] Moreover, it was likely that the imposition of the additional fees or import limitations by unilateral action would result in retaliation by Canada, one of our best customers for fruits and vegetables (R. 143).

In these circumstances, the President did not avail himself of the machinery set forth in Section 22. Instead, the two Governments attempted to solve the mutual problems caused by the large potato surplus, not by independent use of national legislation, but by way of bilateral negotiation. In the resulting agreement, signed on November 23, 1948 (R. 152–155), Canada undertook to place potatoes under export control, not to issue licenses for the exportation of the table stock potatoes to the United States, and to grant export licenses for certified seed potatoes to the United States only if the contract between the Canadian exporter and

[4] It was said that there was too little time left before the presidential conventions of 1948 to improve on the procedures of Section 22 (94 Cong. Rec. 8450–8451). See, however, Section 104 of the Trade Agreements Extension Act of 1953, 67 Stat. 472, modifying the procedures under Section 22, which permits the President to take immediate action pending the proceedings before the Tariff Commission, and also see the Trade Agreements Extension Act of 1951, 65 Stat. 72, 75.

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the United States importer included a clause "in which the importer would give an assurance that the potatoes would not be diverted or reconsigned for table stock purposes" (R. 153–154).[5]

In exchange, the United States agreed not to impose the quantitative limitations or fees provided for in Section 22 upon Canadian potatoes of the 1948 crop and, furthermore, gave assurances that certain anticipated potato price support measures of the Canadian Government, necessitated by the limitations upon the export of table stock potatoes, would not be considered subsidies within the meaning of Section 303 of the Tariff Act of 1930 (46 Stat. 687, 19 U. S. C. 1303), authorizing the imposition of countervailing duties. The agreement went into effect on November 23, 1948 (R. 152),[6] and came to an end on June 20, 1949 (R. 136). On November 26, 1948, Canada issued an Order in Council subjecting potatoes to export control (R. 98–99).

2. *Respondent's Potato Imports.* In December 1948, respondent, a Virginia corporation which grows and ships potatoes and vegetables on the eastern seaboard of the United States (R. 1, 4, 150, 151, 158), purchased approximately 50,000 100-pound bags[7] of potatoes from a Canadian ex-

[5] As their names imply, table stock potatoes are intended for consumption and seed potatoes for planting.

[6] According to R. 136, it went into effect on December 1, 1948.

[7] Potatoes are commonly sold in 100-pound bags (R. 109).

porter, H. B. Willis (R. 13, 150–151). In view of the requirement of the Executive Agreement and of the Canadian Order in Council that the American importer give assurances that the potatoes would be used for seed purposes only and not diverted or reconverted for table stock purposes (*supra*, pp. 5–6), respondent wired Willis on December 27, 1948 (R. 18, 151):

> Certified seed potatoes loaded on S. S. *Gangway* are for planting in Florida and Georgia.[8]

The S. S. *Gangway*, on which the potatoes were loaded, left Canada during the last days of December 1948 (R. 18) and arrived off Jacksonville, Florida, on January 9, 1949 (R. 18). On January 11, 1949, respondent sold all but 10,000 bags of the potatoes, without restrictions as to the disposition of the potatoes (R. 60, 151, 165), to the Atlantic Commission Company (R. 151), a fruit and vegetable buying subsidiary of the Great

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[8] Respondent was well aware of the purpose and implications of this telegram. When questioned by the U. S. Department of Agriculture about a statement allegedly made by respondent that it had special permission to sell seed potatoes for edible use (R. 101–102), it denied having made such statement (R. 103) and added:

"I realize fully the agreement with Canada, its intent and want to and expect to cooperate with the program. I am only bringing in seed [potatoes] for seed purposes * * *." (R. 104.)

The Court of Appeals found that respondent's officers knew of the Executive Agreement and its requirements (R. 165).

Atlantic and Pacific Tea Company (R. 41).[9] The Atlantic Commission Company resold some 13,600 bags to the A. & P., the rest to a number of fruit and vegetable wholesale dealers located in Florida, Georgia, and Alabama (R. 47–48, 159–161).[10] The evidence tends to indicate that most, if not all, of the potatoes were sold to retail establishments as table stock potatoes (R. 22–38, 165).

This venture, made possible by respondent's misrepresentations to the Canadian and United States authorities, turned out to be highly profitable. The potatoes bought per invoice dated January 4, 1949, at $88,350.08 (R. 150–151) were resold January 11 for $162,622.40 (R. 151). Taking into account the freight charges of $19,417.60 (R. 158) and the customs duties of approximately $37,000.00,[11] respondent was able to make within a week a profit of approximately $18,000.00 or 20 percent, while saddling the United States with the virtually certain liability of having to purchase al-

[9] The Great Atlantic and Pacific Tea Co. is essentially a retail grocery organization (R. 41).

[10] Atlantic Commission Co. resold to respondent 10,000 bags of potatoes at $3.65 per bag (R. 44–45, 151). Respondent disposed of these potatoes at prices ranging from $3.75 to $4.00 (R. 65–66; Exh. 4, R. 152).

Of the 48,553 bags of potatoes purchased by it, Atlantic Commission Co. resold 10,000 to respondent, as just stated, and sold 13,627 to the A. & P. (R. 159) and 24,926 (34,926 less 10,000 to respondent) to various wholesalers (R. 160–161).

[11] $0.75 per cwt. (see *supra*, fn. 3, p. 4).

most 50,000 additional bags of potatoes at an average price of $3.00.[12]

3. *The Proceedings Below.* On January 17, 1951, the United States brought suit in the District Court. Its complaint was based essentially on the theory that the clause "certified seed potatoes * * * are for planting * * *," contained in the contract between respondent and the Canadian exporter (*supra*, p. 7), constituted a promise for the benefit of the United States, that respondent had breached this contract, and that as a result of this breach the United States was compelled to purchase 48,544 additional bags of potatoes under the Agricultural Act of 1948 at a net cost of $150,486.00.[13] The complaint asked for $150,486.00 in damages (R. 1–4).

The District Court in sustaining the complaint against a motion to dismiss (R. 13–16) held that respondent had made a promise to use the potatoes for seed only and that the United States was the beneficiary of this undertaking (R. 15–16). At the trial the District Court, however, directed a verdict in favor of respondent at the conclusion of the Government's case (R. 147–149) on the grounds that respondent had not breached its agreement and that the Government had not shown any damages.

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[12] See *supra*, fns. 1, p. 3, and 10, p. 8.

[13] This sum is based not on the support price paid by the United States for 48,544 bags of potatoes but on the net costs to the United States (cf. R. 30–32).

The Court of Appeals affirmed the decision of the District Court but on other grounds (R. 164–170). It concurred in the finding of the District Court that the telegram stating that the potatoes were for planting was of a contractual nature designed to benefit the United States (R. 166, 169). Disagreeing with the District Court, the Court of Appeals had "little difficulty in seeing in the evidence breach of contract on the part of defendant and damage resulting to the United States from the breach" (R. 166).[14] It sustained the decision of the District Court because it considered the contract unenforceable for two reasons. First, it held the contract merely sought to carry out the Executive Agreement and that the Agreement was void because (*a*) the President lacked the power to enter into the Executive Agreement since he had not been granted specific authority either by the Constitution or by Congress (R. 166–169), and (*b*) the President could not avoid compliance with the specific statutory procedure provided by Congress through the expedient of entering into an Executive Agreement. Second, the court held that it could not give effect to the contract unless Congress had expressly authorized that method of

[14] The court found that "there is evidence from which the jury could properly have drawn the conclusion that they were sold on the market as food displacing potatoes grown in this country and causing damage to the United States by requiring greater purchases of American grown potatoes in aid of the price support program than would have been necessary in the absence of their importation" (R. 165–166).

enforcing "what is essentially a breach of a trade regulation" (R. 166, 169–170).

REASONS FOR GRANTING THE WRIT

This is an already notable case in which the Fourth Circuit, by invalidating a commercial agreement representative of numerous other executive compacts, has sought to confine the President's power to make Executive Agreements within bounds far narrower than those set by this Court and by historic practice. In addition, finding conflict with the Agricultural Adjustment Act where none existed, the court has rejected an agreement which fully conformed to Congressional policy and implemented the subsidy program established by the Act. The result is a restrictive decision casting such serious doubt on the accepted powers of the Executive as the country's instrument in foreign affairs that it requires review and correction by this Court.

1. The initial ruling below—that the President cannot without Congressional authorization consummate an international agreement which regulates foreign commerce, because that field is reserved by the Constitution to Congress (R. 166–167)—is inconsistent with this Court's decisions defining the Executive's foreign relations powers, as well as with the understanding of many decades.[15] As an attribute "of sovereignty" the na-

[15] On the importance of Executive Agreements as a means of carrying out current diplomatic business, see the authori-

tional government "is vested with all the powers of government necessary to maintain an effective control of international relations." *Burnet* v. *Brooks*, 288 U. S. 378, 396; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318; cf. *Knox* v. *Lee*, 12 Wall, 457, 555; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 711. And since the acts of Congress are ineffective outside the national territory (*United States* v. *Curtiss-Wright Corp.*, *supra*, at 318), the foreign relations power is mainly vested in the President who is the organ of the United States in the field of foreign relations (*United States* v. *Curtiss-Wright Corp.*, *supra*, at 319–320; *United States* v. *Pink*, 315 U. S. 203, 222–223).

In major matters the President deals with other nations through formal treaties, but lesser arrangements are open for minor issues. The very circumstance that the Constitution (Art. II, Section 2, par. 1) provides that treaties made by the President have to be ratified by the Senate indicates that international agreements not amounting to treaties may be concluded by the President alone.[16] International activities are not

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ties cited in fn. 17, *infra*, p. 13. We have been advised by the Department of State that the validity of several hundred Executive Agreements would become questionable if this ruling became accepted law; it would also cast substantial doubt on the authority of the United States to enter into routine arrangements with foreign nations.

[16] Cf. *Knox* v. *Lee*, 12 Wall. 457, 534. It has been suggested that the power to enter into "such international agreements

limited to the conclusion of formal treaties; they include a host of temporary and less formal arrangements, understandings, and compacts without which current diplomatic business could not be carried on.[17]

This distinction between formal treaties[18] and lesser agreements was well known to the draftsmen of the Constitution.[19] It has been recognized from the beginning of our life as a federal nation, and the Presidents have regularly

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as do not constitute treaties," if not based upon the Constitution, would flow by virtue of the law of nations from the very fact of sovereignty. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318.

[17] Hackworth, *Digest of International Law*, Vol. 5, pp. 392, 397; Moore, *Treaties and Executive Agreements* (1905), 20 Pol. Sci. Quar. 385, 389–393; Crandall, *Treaties and Their Making* (2d ed., 1916) 102; Sayre, *The Constitutionality of the Trade Agreements Act* (1939), 39 Col. L. Rev. 751; Levitan, *Executive Agreements: A Study of the Executive in the Control of the Foreign Relations of the United States* (1940), 35 Ill. L. Rev. 365; Riesenfeld, *International Relations*, 25 Cal. L. Rev. 643, 670–672; Comment: *Executive Agreements and the Proposed Constitutional Amendments to the Treaty Power*, 51 Mich. L. Rev. 1202, 1206–1207; cf. *Watts* v. *United States*, 1 Wash. Ter. 288, 294.

[18] The records of the Federal Convention indicate that the framers of the Constitution were essentially concerned with peace treaties and treaties giving away national territory or affecting fishing and navigation rights. Farrand, *The Records of the Constitutional Convention of 1787*, Vol. II, p. 543; Vol. IV (Rev. Ed., 1937), p. 58. Warren, *The Making of the Constitution*, pp. 653–658.

[19] Significantly, Art. I, Section 10, pars. 1 and 3, of the Constitution differentiates between treaties, agreements, and compacts. Cf. *Holmes* v. *Jennison*, 14 Pet. 540, 572; Weinfeld, *What did the framers of the federal Constitution mean*

availed themselves, without legislative permission, of the device of the nontreaty agreement or compact. See fn. 17, *supra*, p. 13. This Court has explicitly confirmed the President's capacity, subject to constitutional limitations, to enter into such executive agreements in appropriate cases. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318, 320; *United States* v. *Belmont*, 301 U. S. 324, 331; *United States* v. *Pink*, 315 U. S. 203, 229–230; cf. *Field* v. *Clark*, 143 U. S. 649, 681 ff; *Altman & Co.* v. *United States*, 224 U. S. 583; *Monaco* v. *Mississippi*, 292 U. S. 313, 331.[20] Executive agreements so concluded have the same status as treaties (*Altman & Co.* v. *United States*, 224 U. S. 583) and are the supreme law of the land (*United States* v. *Belmont*, 301 U. S. 324, 331; *United States* v. *Pink*, 315 U. S. 203, 230), subject to constitutional limitations.

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by "Agreements or Compacts?", 3 Univ. of Chi. L. Rev. 453. The distinction between treaties and less formal, temporary agreements was discussed in detail in Vattel, *Law of Nations*, Book II, Chapters XII, XIV. On the profound influence of Vattel upon the leaders of the American Revolution, see Vattel, *The Law of Nations* (Classics of Int. Law Ed.), Vol. 3, xxix–xxx.

[20] The *Curtiss-Wright* case involved a presidential proclamation made pursuant to Congressional authority but the decision rests on the basic consideration that in the field of foreign relations the President is invested with "a very delicate, plenary, and exclusive power * * * which does not require for its exercise an act of Congress" (299 U. S. 320). Cf. the concurring opinion of Mr. Justice Jackson in *Youngstown Co.* v. *Sawyer*, 343 U. S. 579, 635–636, fn. 2. The executive agreement which was upheld in *United States* v. *Belmont*, 301 U. S. 324, 330–331, and *United States* v. *Pink*, 315 U. S.

The appropriateness of the Executive Agreement of November 23, 1948, is proved by its heritage in our history. General commercial arrangements by the President go back to the early 19th century. See Sayre, *op. cit.*, fn. 17, *supra*, at pp. 770–771; McClure, *International Executive Agreements* (1941), pp. 56 *et seq.* For over sixty years there have been agreements specifically dealing with imports, duties, and customs reciprocity. *Infra*, pp. 18–22. This has been a well-marked area in which Presidents have not hesitated to make international commitments, especially in supplement and aid of Congressional programs and policies.

Nothing in the Constitution forbids this established practice. The specific grant to Congress of legislative power over foreign commerce, stressed in the decision below (R. 167–168), does not exclude this field from the reach of the President's foreign relations power. Authority to adjust claims against the United States is a recognized Congressional power but the President's power to make such settlements in the international sphere has never been doubted. See, e. g., *United States* v. *Pink*, 315 U. S. 203, 240 (concurring opinion). At the water's edge, Presidential authority and

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203, 223, was entered into without any previous Congressional authorization; and see *Chicago & Southern Air Lines* v. *Waterman S. S. Co.*, 333 U. S. 103, 109, stressing the President's powers in the field of foreign affairs which are not derived from Congressional delegation.

Congressional power are frequently concurrent; executive foreign relations power would be virtually nonexistent if it were barred from all those topics on which Congress has the right to legislate. Indeed, coexistence of these double powers is inherent in our constitutional system. Congressional authority is basically limited to American territory, especially where noncitizens are involved,[21] while the executive power has its effects essentially abroad. We know of no controlling decision which holds or suggests that the mere existence of, or some action under, Congressional authority in a field of legislation precludes foreign affairs action by the Executive in the same field. In particular, this Court has declared repeatedly that the foreign commerce powers of Congress and the foreign relations powers of the President are not mutually exclusive and that there is a broad area in which the two overlap. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 320; *Knauff* v. *Shaughnessy*, 338 U. S. 537, 542; *Chicago & Southern Air Lines* v. *Waterman S. S. Co.*, 333 U. S. 103, 109; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 711–713.

2. The second ground relied upon by the court below in holding the Executive Agreement invalid

[21] *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318; *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 357; *Foley Bros.* v. *Filardo*, 336 U. S. 281, 285; *United States* v. *Spelar*, 338 U. S. 217, 222; cf. *Steele* v. *Bulova Watch Co.*, 344 U. S. 280.

is that Congress, in Section 22 of the Agricultural Adjustment Act, has established an elaborate procedure of dealing with imports interfering with the price support program (*supra,* pp. 4–5) and that the President could not "avoid" compliance with these procedural requirements by recourse to his foreign relations powers (R. 168).[22] But there is no evidence that Congress intended to make Section 22 an exclusive procedure; on the contrary, there are persuasive indications that this type of legislation not only envisages, but gives congressional sanction to, the making of Executive Agreements.

Section 22 of the Agricultural Adjustment Act deals with a frequently recurrent problem in international relations. A foreign country may discriminate against the United States or flood our country with imports to the extent of undermining our economy, or of interfering with legislative programs, as in this case. There are two basic methods by which to cope with such disturbances. They are a diplomatic settlement through bilateral negotiation, or the invocation of unilateral retaliatory measures, such as recip-

[22] This argument, which is based to some extent on *Youngstown Co.* v. *Sawyer*, 343 U. S. 579, dealing with the internal powers of the President, disregards the essential difference between the President's powers in foreign and domestic affairs. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319, 321; and see the concurring opinions of Justices Frankfurter and Jackson in *Youngstown Co.* v. *Sawyer*, *supra*, at 597, 610, and fn. 2, at 635–636.

rocating discrimination or the imposition of burdens on imports like additional duties, import quotas, or even complete embargoes. The former method may be utilized by the President under his foreign relations powers alone; the latter often requires an act of Congress.[23]

In the face of the established understanding of both Congress and the President as to the interrelationship and coexistence of these two devices (cf. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 422; *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 327), the decision below holds that where Congress grants to the President retaliatory powers to deal with a specific import situation, it makes the exercise of this authority the exclusive method of settling the international problem and automatically terminates the Executive's power to adjust disputes of this type by way of negotiation. But the fact is that if the scope of such retaliatory legislation were limited to punishment, it would be doomed to failure, since the other country usually is able to impose equally onerous counter-reprisals.[24] Thus employed it would lead only to a gradual deterioration of foreign relations. It is

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[23] Cf. the discussion between Senator Millikin and Mr. Brown, Director of the Office of International Trade Policy, Department of State, on the extension of the Reciprocal Trade Agreements Act, Hearings before the Committee on Finance, United States Senate, 81st Cong., 1st Sess., on H. R. 1211, p. 844.

[24] Cf. R. 143 and Senator Tydings' remarks at 79 Cong. Rec. 11503.

for this reason that it has long been realized that the real function of this type of statute is to induce the other country to desist from its objectionable activities. *The Francis & Eliza*, 108 Fed. 541, 545 (E. D. La., 1820), reversed on other grounds, 8 Wheat. 398. This is a goal which cannot ordinarily be achieved by two independent legislatures without channels of communication, but only by way of negotiation between those branches of the governments which are equipped to deal directly with one another.[25] Hence, it has been understood by the Congress and by the Executive for at least three-quarters of a century that retaliatory powers are granted to the President primarily to strengthen his position at the conference table, and that their use is to be secondary after attempts at amicable settlement have failed.[26]

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[25] Cf. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 320. Recalling the unfortunate experience under the Articles of Confederation (Art. IX) which vested the treaty-making power in Congress, the Federalist (Nos. 64 and 75) points out that the executive is the most fit agent to conduct negotiations.

[26] The decisions of this Court discussing retaliatory commercial legislation fully recognize that the intent of these statutes is to strengthen, not to abrogate, the foreign relations power. *Field* v. *Clark*, 143 U. S. 649, 682–694, especially at 691; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 421–430, especially at 422; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 322–329, especially at 327.

Cf. Annual Message of President Grant, December 5, 1870, Foreign Relations of the United States, 1870, pp. 11–13, and President Theodore Roosevelt's advice to talk softly while carrying a big stick in reserve.

Section 3 of the Tariff Act of 1890 (26 Stat. 612) is the leading instance of retaliatory legislation which served as the basis for the conclusion of executive agreements in the commercial field. This provision, held constitutional in *Field* v. *Clark*, 143 U. S. 649, 680–691, authorized the President, if he found that a country imposed unequal or unreasonable duties upon certain articles imported from the United States, to suspend the duty-free importation of those goods from such a country into the United States.[27] This section was utilized as the bargaining basis for at least twelve reciprocal trade agreements with the same objectives as the Act (Sen. Exec. Doc. 119, 52d Cong., 1st Sess., p. 2). Subsequent Congressional discussion disclosed that both political parties fully approved of this use of the President's foreign relations power (26 Cong. Rec. 6981–7000). It was even suggested on the floor of the Senate that the grant to the President of retaliatory powers in Section 3 carried with it direct authority to eliminate discrimination by way of negotiation (26 Cong. Rec. 6991).[28] And Section 71 of the Tariff

[27] A similar retaliatory clause was found in Section 5 of the Meat Inspection Act of 1890, 26 Stat. 414, 415.

[28] While at least one Senator disagreed with this broad interpretation of the clause (26 Cong. Rec. 6991), no one suggested that the grant of retaliatory powers negatived the power to negotiate Executive Agreements. It should be noted that Congress had refused to include in the Tariff Act of 1890 a provision expressly authorizing the making of reciprocal trade agreements (cf. statement of Senator Gray at 26 Cong. Rec. 6987).

Act of 1894 (28 Stat. 569), which repealed Section 3 of the Tariff Act of 1890, contained an express provision saving the reciprocal arrangements entered into under Section 3. The practice with respect to later statutes authorizing retaliatory measures has been similar; Executive Agreements have often been made, both under and apart from specific authorization, in order to effectuate the general statutory policy. See McClure, *International Executive Agreements* (1941), pp. 84–92, 173 ff.[29]

The legislative and post-legislative history of Section 22 [30] discloses that Congress was aware of the practice that statutes of this type are intended to support rather than to curb the President's foreign relations powers. During the discussion which preceded its enactment, Congress was informed (79 Cong. Rec. 11503) that the President

[29] Examples of these statutes are: Tariff Act of 1909, Section 2, 36 Stat. 82; Tariff Act of 1922, Section 317, 42 Stat. 944; Tariff Act of 1930, Section 338, 46 Stat. 704, 19 U. S. C. 1338. The latter provision is still in effect. Under the Reciprocal Trade Act (48 Stat. 943, 19 U. S. C. 1351–1354), the power of retaliation has also been utilized as a basis for negotiation rather than for unilateral action. Cf. *Policy of United States Concerning Generalization of Tariff Concessions*, 12 Department of State Press Release 212, 214, 219. The Anti-dumping Act of 1921, 42 Stat. 11, 19 U. S. C. 160–171, and Section 303 of the Tariff Act of 1930, 46 Stat. 687, 19 U. S. C. 1303, raise similar problems. See also 19 U. S. C. 130, 131, 46 U. S. C. 141, 142 (tonnage duties).

[30] Section 22 was inserted into the Agricultural Adjustment Act by Section 31 of the Act of August 24, 1935, 49 Stat. 773.

had utilized the analogous provision of Section 3 (e) of the National Industrial Recovery Act as the basis of negotiations under which Japan, as in the instant case Canada, agreed to limit its export of matches to the United States (see *Foreign Relations of the United States, 1934,* Vol. III, pp. 801–805).[21]

Moreover, Section 22 (f), as originally enacted by the Agricultural Act of 1948 (*infra,* p. 30) and as it was in effect on November 23, 1948, provided that the administrative mechanism of Section 22 was not to be enforced "in contravention of any treaty *or other international agreement* to which the United States is or *hereafter* becomes a party" [emphasis added]. Congress thereby assumed that the President had authority to negotiate agreements *in conflict* with the very policy of Section 22 and expressly declared that such contravening agreements would take precedence over the statutory policy. It would be incongruous to suppose that Congress recognized the President's authority to depart from the policy of Section 22 by way of Executive Agreement

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[21] The possible argument that Section 22 is couched in mandatory language ("the President shall") and, hence, that the President has to follow the statutory procedure once its conditions have been met, and is not at liberty to follow another method of reaching the same result, is in conflict with the legislative history of Section 22. Cf. 79 Cong. Rec. 9591–9592 (rejection of amendment to make Section 22 mandatory); 79 Cong. Rec. 11497–11526 (constant reference to intent to delegate discretionary powers to President).

but denied him the use of that method when he sought to carry out the spirit and purpose of the statute. In 1950 and 1951, Section 22 (f) was amended to limit the President's power to enter into agreements *inconsistent* with the purposes of Section 22.[32] But although Congress has been advised of the potato agreement with Canada (Extension of Reciprocal Trade Agreements Act, Hearings before the Committee on Finance, United States Senate, 81st Cong., 1st Sess., pp. 898–899, 918–921), and has three times reexamined Section 22 (Acts of June 28, 1950, Sec. 3, 64 Stat. 261; and June 16, 1951, Sec. 8 (b), 65 Stat. 75, and August 7, 1953, Section 104, 67 Stat. 472), it has never taken any steps to deny the President the power to carry out the policy of that Section through bilateral negotiation. This history seems clearly to indicate that Congress has not forbidden agreements harmonious with the aims of the statute; and there can be no doubt (and neither respondent nor the Fourth Circuit have denied) that the Executive Agreement in this case was fully compatible with the policy and objectives of Section 22.

3. Finally, the Court of Appeals, while conceding that the United States was the beneficiary of a contract for the benefit of a third party and

[32] See S. Rep. No. 1375, 81st Cong., 2d Sess., p. 4; H. Rep. No. 2269 (conference report), 81st Cong., 2d Sess., p. 5; S. Rep. No. 299, 82d Cong., 1st Sess., p. 7; H. Rep. No. 537 (Conference Report), 82d Cong., 1st Sess., p. 4.

that it suffered tangible damage from respondent's breach (R. 166, 169), held that no action can be maintained on this contract, in the absence of express authorization by Congress, even if the Executive Agreement is valid (R. 169–170). This argument disregards the well-settled rule that no specific authorization is required for the judicial enforcement of a contractual right of the United States. *Dugan* v. *United States*, 3 Wheat. 172, 181; cf. *Cotton* v. *United States*, 11 How. 229, 231–232; *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 550.[33]

United States v. *Standard Oil Co. of California*, 332 U. S. 301, relied upon by the court below (R. 169–170), does not hold to the contrary. The question presented in that case was whether the Court should expand, by way of analogy, the tortfeasor's liability to an employer for loss of his injured employee's services to a situation to which it had not applied before—the relationship between the United States and its military personnel. The Court refused to create what it considered to be

[33] If the court below believed that this rule, while applicable to situations where the United States acts in a "proprietary" capacity, does not govern contracts entered into in the "governmental" sphere (cf. R. 169), it overlooked the principle that every activity of the United States is governmental. *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 477; *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95, 102; *Cotton* v. *United States*, 11 How. 229; cf. *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 550; *United States* v. *Standard Oil Co. of California*, 332 U. S. 301, 315.

a new cause of action *in consimili casu* without congressional sanction; it pointed out, however (at 315), that no statutory authorization was required where the United States merely seeks to enforce a traditional remedy. Here, the United States asks enforcement of a recognized contractual right—third-party beneficiary liability—not the creation of a new remedy.

On this point, the decision below is opposed to the principles laid down by the Court of Appeals for the Third Circuit in *United States* v. *LeRoy Dyal Co.*, 186 F. 2d 460, certiorari denied, 341 U. S. 926. That case involved the breach of a contract entered into, in connection with an earlier potato price support program, between the Commodity Credit Corporation and a potato dealer in which the latter agreed not to purchase potatoes from a farmer who was not an eligible dealer. While the main issue was whether a liquidated damage clause was enforceable or constituted a penalty, the court had no difficulty in finding that the defendant was "liable according to his agreement for breaking a contract voluntarily entered into" (186 F. 2d 464), and in judicially enforcing that liability. Unlike the court below, the Third Circuit affirms the Government's right to take advantage of contractual stipulations to carry out its programs. And as appears from the *LeRoy Dyal* case, the Agricultural Adjustment program has been largely enforced by way of contractual

agreements, and there are other existing and potential projects in the same class.[24]

CONCLUSION

For the above reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT L. STERN,
Acting Solicitor General.

SEPTEMBER 1953.

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[24] The decision below is in direct conflict with the unreported decision of the United States District Court for the Eastern District of New York in *United States v. Carpenter* (*infra*, Appendix B, pp. 32–38), where, in a situation virtually identical with the one at bar, the District Court upheld a complaint against an importer of potatoes and granted a preliminary injunction prohibiting the sale of imported seed potatoes for table purposes. That court refused to pass on the Executive Agreement, holding that, whether or not it was valid, the importer had validly contracted with his Canadian exporter not to sell or use the potatoes for seed purposes, and the United States could take the benefit of that agreement.

APPENDIX A

Constitutional and Statutory Provisions Involved

(a) *Constitution.*

Art. I. Section 10, pars. 1 and 3. provide in pertinent part:

> Section 10. No State shall enter into any Treaty Alliance, or Confederation; * * *.
>
> No State shall without the Consent of Congress * * * enter into any Agreement or Compact with another State, or with a foreign power * * *.

Art. II. Section 2 provides in pertinent part:

> * * * * *
>
> He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; * * *.

(b) Section 22 of the Agricultural Adjustment Act as amended by Section 3 of the Agricultural Act of 1948 (62 Stat. 1249, 7 U. S. C. 624) provided in November 1948:

> Sec. 22. (a) Whenever the President has reason to believe that any article or articles are being or are practically certain to be imported into the United States under such conditions and in such quantities as to render or tend to render ineffective, or materially interfere with, any program or operation undertaken under this title or the Soil Conservation and Domestic Allotment Act, as amended, or section 32, Pub-

lic Law Numbered 320, Seventy-fourth Congress, approved August 24, 1935, as amended, or any loan, purchase, or other program or operation undertaken by the Department of Agriculture, or any agency operating under its direction, with respect to any agricultural commodity or product thereof, or to reduce substantially the amount of any product processed in the United States from any agricultural commodity or product thereof with respect to which any such program or operation is being undertaken, he shall cause an immediate investigation to be made by the United States Tariff Commission, which shall give precedence to investigations under this section to determine such facts. Such investigation shall be made after due notice and opportunity for hearing to interested parties, and shall be conducted subject to such regulations as the President shall specify.

(b) If, on the basis of such investigation and report to him of findings and recommendations made in connection therewith, the President finds the existence of such facts, he shall by proclamation impose such fees not in excess of 50 per centum ad valorem or such quantitative limitations on any article or articles which may be entered, or withdrawn from warehouse, for consumption as he finds and declares shown by such investigation to be necessary in order that the entry of such article or articles will not render or tend to render ineffective, or materially interfere with, any program or operation referred to in subsection (a), of this section, or reduce substantially the amount of any product processed in the United States from any

such agricultural commodity or product thereof with respect to which any such program or operation is being undertaken: *Provided*, That no proclamation under this section shall impose any limitation on the total quantity of any article or articles which may be entered, or withdrawn from warehouse, for consumption which reduces such permissible total quantity to proportionately less than 50 per centum of the total quantity of such article or articles which was entered, or withdrawn from warehouse, for consumption during a representative period as determined by the President: *And provided further*, That in designating any article or articles, the President may describe them by physical qualities, value, use, or upon such other bases as he shall determine.

(c) The fees and limitations imposed by the President by proclamation under this section and any revocation, suspension, or modification thereof, shall become effective on such date as shall be therein specified, and such fees shall be treated for administrative purposes and for the purposes of section 32 of Public Law Numbered 320, Seventy-fourth Congress, approved August 24, 1935, as amended, as duties imposed by the Tariff Act of 1930, but such fees shall not be considered as duties for the purpose of granting any preferential concession under any international obligation of the United States.

(d) After investigation, report, finding, and declaration in the manner provided in the case of a proclamation issued pursuant to subsection (b) of this section, any proclamation or provision of such proclamation may be suspended or terminated by the

President whenever he finds and proclaims that the circumstances requiring the proclamation or provision thereof no longer exist or may be modified by the President whenever he finds and proclaims that changed circumstances require such modification to carry out the purposes of this section.

(e) Any decision of the President as to facts under this section shall be final.

(f) No proclamation under this section shall be enforced in contravention of any treaty or other international agreement to which the United States is or hereafter becomes a party.

(c) Section 1 (b) of the Agricultural Act of 1948 (62 Stat. 1247) provides:

SECTION 1. Notwithstanding any other provision of law, the Secretary of Agriculture is authorized and directed through any instrumentality or agency within or under the direction of the Department of Agriculture, by loans, purchases, or other operations * * *.

* * * * *

(b) To support until January 1, 1950, a price to producers of commodities with respect to which the Secretary of Agriculture by public announcement pursuant to the provisions of the Act of July 1, 1941, as amended, requested an expansion of production of not less than 60 per centum of the parity or comparable price therefor nor more than the level at which such commodity was supported in 1948, except that Irish potatoes harvested before January 1, 1949, milk and its products, hogs, chickens, and eggs shall be supported at 90 per

centum of the parity or comparable price. The comparable price for any such commodity shall be determined and used by the Secretary for the purposes of this subsection if the production or consumption of such commodity has so changed in extent or character since the base period as to result in a price out of line with parity prices for the commodities referred to in (a) hereof. In carrying out the provisions of this subsection the Secretary of Agriculture shall have the authority to require compliance with production goals and marketing regulations as a condition to eligibility of producers for price support.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
Civ. 9799, May 13, 1949

UNITED STATES OF AMERICA, PLAINTIFF

v.

ANTHONY C. CARPENTER, DEFENDANT

KENNEDY, J.

Two motions are involved here. One by the plaintiff is for a preliminary injunction (a temporary restraining order has been issued). The second by the defendant is for an order dismissing the complaint on the ground that it fails to state a claim of any kind.

The complaint alleges that Carpenter is a potato dealer in business at Water Mill, Long Island, New York. Under the Agricultural Act of 1948 (Ch. 827, P. L. 897, 80th Cong.) the United States Department of Agriculture is charged with the duty of supporting the price of certain agricultural commodities, including Irish potatoes. Pursuant to that act and predecessor legislation, the department has for some years purchased, and now continues to purchase, all eligible Irish potatoes offered by an eligible vender. The supporting price is $3.45 per 100 pounds.

On November 23, 1948, according to the complaint, the United States discovered that large quantities of potatoes harvested in Canada were

being exported to the United States. Some time prior to November 23, 1948, discussions were carried on between the American State Department and the Canadian Ambassador. The result of these discussions was an exchange of notes, in the course of which the Canadian government announced that it would agree to require permits for Irish potatoes and to withhold permits for all table stock potatoes. Moreover, the United States was assured by the Canadian government that no export permits would be granted to Canadian growers, unless the export contract included the clause under which the importer gave an assurance that the potatoes would not be converted or reassigned for table stock purposes.

Between October 1948 and January 1949, the defendant Carpenter purchased more than 65 carloads of Canadian certified Irish seed potatoes. In each case there was included in the contract with the Canadian exporter the assurance that "these potatoes will be used for seed purposes only."

The complaint also alleges that the "defendant's agreement to use the seed potatoes imported from Canada for seed purposes only was made for the benefit of the United States," and that the defendant has violated these contracts made with the Canadian exporters in that he has made repeated sales of large quantities of the potatoes for table stock purposes, and has threatened to make other such sales. It is alleged that the United States has already been damaged to the extent of $9,000 by Carpenter's violations of his contracts with the Canadian exporters. The prayer for relief is that Carpenter be enjoined from further

sales of the potatoes for table stock, and also that money damages be awarded to the plaintiff, United States.

In support of his opposition to the issuance of an injunction and also in support of his motion to dismiss the complaint, the defendant alleges that the executive agreement between the Canadian and the American governments, evidenced by the exchange of notes, is void. It is pointed out that under the Agricultural Act of 1948 (7 U. S. C. A. § 624 (b)) and the Tariff Act of 1930, as amended (19 U. S. C. A. § 1354, 1357–1359), there are certain restrictions against and conditions upon executive proclamations which limit the total quantity of any article that may be entered into the United States. Notably, these limitations and conditions are to be found in section 22 (a) of the Agricultural Act of 1948 (7 U. S. C. A. § 624 (b)). The government asserts that these limitations are not applicable to the type of agreement outlined above. Concededly, the exchange of notes of November 23, 1948, was not preceded by some of the statutory conditions, i. e., hearings, and in general the agreement was not made in compliance with the statutes mentioned. And the defendant urges that the section 22 (a) of the Agricultural Act (7 U. S. C. A. § 624 (b)) squarely covers any executive action restricting the importation of Canadian potatoes.

As I understand the argument of the government, it is to the effect that even if the statutory limitations might otherwise be applicable, this is the kind of executive agreement which is within the competence of the United States government to make regardless of the attitude of the legisla-

tive branch (citing *U. S.* v. *Curtiss-Wright Export Corp.*, 1936, 299 U. S. 304, 318; *U. S.* v. *Belmont*, 1937, 301 U. S. 324, 330, 331; *U. S.* v. *Pink*, 1942, 315 U. S. 203, 228–230). In reply, defendant says that these cases apply only to the regulation of external or foreign affairs and that the agreement mentioned in the complaint at bar is in fact an attempt to regulate the internal economy of the United States.

But I do not think it is necessary for me, in the disposition of the motions, to decide whether the so-called executive agreement is valid.

It is conceded by the defendant that he has violated the agreement between himself and the Canadian exporters. He furnished an assurance that he would not sell the potatoes covered by his contracts for table stock purposes, yet he did that very thing.[1]

Palpably, the plaintiff United States of America, has sustained damage as a result of the defendant's action, because it has been supporting, and continues to support, the price of table stock potatoes. And in the last analysis, the defendant is unjustly enriched by a subsidy intended not for the benefit of Canadian growers but for the benefit of the American farmers.

The only real question tendered by the motion to dismiss the complaint, therefore, is whether the plaintiff United States of America is entitled to assert and enforce rights growing out of the con-

[1] There is in the papers an admission in writing by the defendant which eliminates any question or doubt about his violation of the contracts. Indeed it was intimated on the argument that the action of the defendant was deliberately taken in order to test out the rights of the parties.

tracts between the defendant and the Canadian growers. Viewed in this light, the validity of the executive agreement is actually not in issue: that agreement is not truly the subject of the controversy, but merely a fact relevant to the controversy. To state it in another way, it is quite conceivable that the Canadian government, as a matter of comity, might, without an agreement, exact from its own nationals an undertaking that every export contract relating to potatoes should contain an assurance by the importer that he would do nothing to disrupt the American system of price support. Whether the United States was the beneficiary of such self-imposed limitations by a foreign government would turn simply on the question whether the foreign government (and through it the exporters) *intended* that such limitations should enure to the benefit of the price supporting system for which the American government was paying. The agreement in the case at bar is relevant to the question of intent.

The complaint alleges that the contracts between the defendant and the Canadian exporters were in fact made for the benefit of the United States of America, at least to the extent that they contain the resale limitation referred to. On familiar principles, if this is truly a question of fact, the motion to dismiss the complaint would necessarily be denied, even though in the first instance the Canadian exporters were led to embody the limitation in their contracts by an executive agreement invalid under the laws of the United States—at least so long as the agreement was not infected by fraud or other circumstances, which would infect everything connected with it.

Some of the contracts between the defendant and the Canadian exporters were made in New York. If one assumes that a trier of the facts made a finding that the export contracts were for the benefit of the United States, and were breached, then there would only remain the law question whether the United States as a third party could maintain the action. I believe that both under federal law and under New York law a beneficiary of such agreements is entitled to maintain suit (*German Alliance Ins. Co.* v. *Home Water Supply Company*, 1912, 226 U. S. 220; *Constable* v. *National Steamship Co.*, 1893, 154 U. S. 51; *In re United Cigar Stores Co.*, 1934, 2 Cir., 70 F. 2d 313; *Regney* v. *New York Cent. & H. R. R. Co.*, 1916, 217 N. Y. 31; *Coley* v. *Cohen*, 1942, 289 N. Y. 365).

If I am right in all this, it follows that the motion to dismiss the complaint must be denied.

The type of preliminary injunction which ought issue (if any) presents a difficult question. It is perfectly clear to me that the plaintiff is entitled during the pendency of the action to an order restraining the defendant against the future violation of Canadian expert contracts. In other words, until the case has been tried, the defendant ought not to be allowed to purchase potatoes in Canada for seed purposes or to take deliveries and resell them in the United States as table stock. But the defendant has on hand a quantity of Canadian potatoes, which, according to the papers, are useless for seed. They are, however, eligible for sale as table stock. Were the preliminary injunction to cover not only future Canadian purchases and deliveries but also such po-

tatoes on hand, those which the defendant now has would undoubtedly spoil before a trial could be had. Then, should it turn out that the plaintiff was not entitled to the relief which it seeks, the harm to the defendant would be irreparable. The plaintiff, I should think would be, to some extent, protected in this phase of the controversy were the defendant to furnish a bond in a penal sum to be agreed upon by the parties or fixed by the court, which would make the plaintiff whole, if it eventually succeeded in the litigation, at least so far as sales of stock useless for seed and presently in the defendant's hands are concerned and so far as money damages are involved. Such an order, it seems to me, would satisfy the requirement of the cases that I must balance conveniences (*Forstmann* v. *Joray Holding Co.*, 1926, 244 N. Y. 25; *Yakus v. U. S.*, 1944, 321 U. S. 414, 440, 441; *International F. Co.* v. *Associated Producers*, S. D. N. Y., 1921, 273 F. 585, 588).

The motion for a preliminary injunction is granted as indicated. Settle order on notice.

(S) Harold M. Kennedy,
HAROLD M. KENNEDY,
United States District Judge.

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